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NOTES OF INDIAN CASES.

ANANT LAL *v.* BHIBHUTI, (1944) I.L.R. 23 Pat. 348.

Baffling, albeit simple, is the term 'agriculturist'. Its precise legal connotation assumes great importance in assessing the scope of the exemption from attachment and sale contained in section 60 (1) (*c*), Civil Procedure Code and from vesting in bankruptcy under section 28 (5) of the Provincial Insolvency Act or under section 52 (*b*) of the Presidency Towns Insolvency Act. The Civil Procedure Code does not define the term. The dictionary meanings vary from a husbandman, a farmer, to any person employed in the art or science of agriculture. According to Murray's Dictionary an agriculturist is a professed cultivator of land, a farmer or husbandman. The term has been the subject of discussion in a large number of decisions indicating wide diversity of approach and thought. A liberal interpretation has been favoured in some cases. Typical of these is the decision in *Gurbaksh Singh* v. *Lal Chand Darshan Lal*,[1] where it was observed that there seems to be no justification for holding that for purposes of section 60 the term excludes a large landowner or one who does not depend solely or mainly on cultivation for his livelihood. A contrary view is found in decisions like *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[2]. In that case it was held that a large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of section 60. That the word ought to be understood in its popular sense has been suggested in a number of rulings. In *Bachan Singh* v. *Bhika Singh*[3], it was held that for purposes of section 60 (1) (*c*) an 'agriculturist' is one "belonging to the class of persons who are ordinarily designated as agriculturists". Likewise in *Ashmatulla Sircar* v. *Pan Mahmud Chowdhury*[4], it was pointed out by the Calcutta High Court that section 60 (1) (*c*) protects only the "common agriculturists such as live in the country", that is, the raiyats who till the field and whose main source of livelihood is cultivation.

Another line of cases has laid down that in the context of the respective statutory provisions the term 'agriculturist' should be interpreted in its strictest sense only, a tiller of the soil in that sole character, see *Jivan Bhaga* v. *Hira Bhaiji*[5], *Muhammad Akbar* v. *Harbans Singh*[6], *Sant Ram* v. *Buta Khan*[7].

It is generally agreed that an 'agriculturist' is one not in name merely but in fact, *Bute Shah* v. *Guran Ditta*[8]. It is also clear that the matter will have to be

1. A.I.R. 1936 Lah. 737.
2. (1925) I.L.R. 49 Mad. 227: 50 M. L.J. 90.
3. A.I.R. 1927 All. 601.
4. (1915) 35 I.C. 343.
5. (1887) I.L.R. 12 Bom. 363.
6. A.I.R. 1936 Lah. 532.
7. A.I.R. 1938 Lah. 72.
8. A.I.R. 1927 Lah. 810.

decided with reference to the facts of each particular case. Tests have been suggested not all of which admit of being reconciled. In some cases it has been laid down that unless a person has personally engaged himself in agriculture he will not be an agriculturist for purposes of section 60. In *Nihal Singh* v. *Siri Ram*[1] it is stated: "The juxtaposition of the word 'agriculturist" along with the word 'artisan' in clause (*b*) implies a person who occupies himself in tilling the soil and whose livelihood depends upon the tilling of the soil. 'Agriculturist' means a person who personally engages himself in the occupation of tilling the soil". In *Rubine* v. *Balwantrai Ramnarayan Trividi*[2], it is remarked that an "agriculturist' is one who ordinarily engages himself personally in agricultural labours. In *Habibul Razzaq* v. *Shiam Bahadur*[3], it is pointed out that for purposes of section 60 a man is an agriculturist who engages in the cultivation of land, that is, who ploughs the land, sows the crop and attends to it; and that the cultivation of land by hired labourers by a person who has a different occupation does not constitute a person an 'agriculturist'. The ruling in *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[4], however, suggests that the term 'agriculturist' does not necessarily mean a person who works with his own hands.

Again decisions are not uniform as to what degree of dependence on agriculture as a source of livelihood would alone make one an 'agriculturist'. Some cases have held that it should be the *sole source* of living. Thus in *Surangini Deby* v. *Kedarnath Chandra*[5], the Calcutta High Court has expressed the opinion that if a person's only source of living is not by cultivation of land he is not an agriculturist within the meaning of section 60 (1) (*c*), Civil Procedure Code. The enunciation is expressed in a positive form in *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot*[4], where the learned Judges observed that an 'agriculturist' is one whose sole means of livelihood is gained by cultivating land. *Lakshmayya* v. *Official Receiver of Masulipatam*[6], seems to lay down a slightly different test. According to the Full Bench in that case: "An 'agriculturist' is one who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief or principal sources of income are not in our view the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an 'agriculturist' within the meaning of the section. . . . The test is he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise". The test of *"real dependence"* on agriculture replaces the test of its being the *"sole source"* of living. This is made clear by the observation of the Full Bench: "At the same time we see no reason for depriving an agriculturist of the exemption under the section because he may have invested money in a business . . . and may derive some income therefrom and do coolie work and add to his earnings in bad times". The test of agriculture being the main, chief or principal source of living is in terms rejected by the Full Bench. The alternative test of its being the sole source of living is qualified and a third test is propounded whether the person is really dependent on agriculture for his living. Quite a large number of cases have accepted the true test to be whether agriculture forms the *main* or *chief* source of living, *Jamna Prasad* v. *Raghunath Prasad*[7], *Bachan Singh* v. *Bhika Singh*[8], *Sabha Ram* v. *Kishan Singh*[9], *Hazari Singh* v. *Jhunna Singh*[10], *Mt. Azaz Bibi* v. *Mubarak Ali Khan*[11], *Rubine* v. *Balwantrai Ramnarayan Trividi*[2], *Ashmatulla Sircar* v. *Pan Mahmud Chowdhury*[12], *Gopalan* v.

1. A.I.R. 1939 Lah. 388 (F.B.).
2. A.I.R. 1923 Bom. 12.
3. A.I.R. 1935 All. 292.
4. (1925) I.L.R. 49 Mad. 227: 50 M.L.J. 90.
5. (1921) 63 I.C. 681.
6. I.L.R. (1937) Mad. 777: (1937) 2 M.L.J. 11 (F.B.).
7. (1913) I.L.R. 35 All. 307.
8. A.I.R. 1927 All. 601.
9. (1930) I.L.R. 52 All. 1027.
10. A.I.R. 1931 All 20.
11. A.I.R. 1938 All. 85.
12. (1915) 35 I.C. 343.

Gopalkrishnayya[1], *Abdullah* v. *Anjuman Dehi*[2], *Muhammad Akbar* v. *Harbans Singh*[3], *Gurbaksh Singh* v. *Lal Chand Darshan Lal*[4].

The decision under notice takes the view that the exemption provided by section 60 (1) (*c*) can be claimed only where the person tills the land and thereby earns his livelihood, though it would not mean that the tilling should be done by his own hands and not by hired labour. The decision also lays down that cultivation must be his main source of living, adding however that "this will not be the sole test". What the qualification implies or is intended to reserve is not set out. The foregoing review indicates clearly the need for an authoritative elucidation by the Judicial Committee in regard to the question.

ANDHAVARAPPU RAMAMURTI *v.* KULAMONI CHAUDHURY, (1944) I.L.R. 23 Pat. 446.

A noteworthy point is decided in the above case which holds that a court outside the province of Madras cannot give relief under section 19 of the Madras Agriculturists Relief Act, 1938, notwithstanding the fact that the court to which the application is made is the very court which passed the decree and which at the time of passing the decree was a court within the the province of Madras. Consequent on the constitution of the province of Orissa on 1st April 1936, the Sub-Court at Berhampore became thereafter a Court functioning within that province and subordinate to the High Court at Patna, instead of to the High Court at Madras as it till then was. On 9th November, 1928, a mortgage decree was passed by the Subordinate Judge, Berhampore, in a suit on a mortgage of properties within the province of Madras. The mortgaged properties continued to remain so even after the constitution of the province of Orissa. The Madras Agriculturists Relief Act was passed in 1938. Thereafter the judgment-debtor in the mortgage suit applied to the Sub-Court, Berhampore, for a scaling down of the amount due under the mortgage decree, under section 19 of that Act. The question of the competency of that Court to entertain the application was put in issue. Section 2 of Madras Act IV of 1938 declares that "it extends to the whole of the province of Madras". Section 19 contemplates that the application for scaling down of the decree should be made to the Court which passed the decree. That Court in the present case was admittedly the Sub-Court, Berhampore. Only it had ceased to be a Court belonging to the province of Madras from 1st April 1936. Under section 99 of the Constitution Act a provincial legislature may make laws for the province or for any part thereof. There is nothing in the provision bearing on the competency of a Court which was originally within the province but which has subsequently passed outside it to give relief under a provincial enactment passed subsequent to its passing out. Section 19 (1) of the Order-in-Council constituting the province of Orissa shows that the jurisdiction of the High Court at Madras with respect to Berhampore shall cease subject to what is stated in sub-section (2). Section 20 of the Order-in-Council provides for a similar cessation of jurisdiction on the part of all subordinate Courts in the transferred areas. And by virtue of section 4 (2) of the Regulation 1 of 1936 a Court actually constituted under the Madras Civil Courts Act was to be deemed to have been constituted so far as may be under the Bengal Civil Courts Act, 1887, according to the Order-in-Council, with the result that the Berhampore Court ceased to have any jurisdiction for any purpose on any matter arising within the province of Madras from the 1st April, 1936, except in so far as any other notification might have given it such jurisdiction. The application in the case under notice was admittedly not a "proceeding pending in a Court" within the meaning of section 20 (1) of the Order-in-Council. In *Tile Beharani* v. *Raghu Behara*[5], before the constitution of the

1. A.I.R. 1927 Mad. 342.
2. A.I.R. 1928 Lah. 132.
3. A.I.R. 1936 Lah. 532.
4. A.I.R. 1936 Lah. 737.
5. (1939) 1 M.L.J. 340.

Orissa province, the respondent had obtained a decree against the appellant's predecessor in title in the Court of the Subordinate Judge, Berhampure, which decree had also been confirmed by the Madras High Court. After 1st April, 1936, an application for the execution of the decree was filed in the Sub-Court, Chicacole, and objection was raised that the application should have been preferred only to the Sub-Court at Berhampore. The learned Judges held that the latter Court would have no jurisdiction in the matter. No doubt it had been held in *Ramier* v. *Muthukrishna Aiyar*[1], that mere loss of territorial jurisdiction does not take away from the Court which passed the decree the power to execute it. That, however, was a case of a mere transfer of jurisdiction from one Court to another Court within the same province and the chief reason for the decision was that a notification of Government altering the territorial jurisdiction of Courts will not affect pending cases unless special reference is made to them and cannot therefore amount to action under section 150 of the Civil Procedure Code. The very fact that the Order-in-Council of 1936 saved jurisdiction in respect of pending proceedings is a pointer that no jurisdiction can exist in regard to a matter not pending at that time. Moreover after the decision of the Full Bench in *Nagappa Chettiar* v. *Annapurani Achi*,[2] the contention is not open that an application under section 19 of Act IV of 1938 is a proceeding in execution. Such an application would be an independent proceeding to enforce a relief newly conferred. The Courts in the Orissa province can enforce only the laws applicable to India generally and the law applicable to their own province. They cannot enforce laws applicable to a province other than their own. It is thus clear as pointed out in the instant decision that a Court outside the province of Madras cannot give any relief under Madras Act IV of 1938 notwithstanding even the special facts that that Court was the very Court which had passed the decree, that the decree was one passed at a time when that Court was within the province of Madras and that the properties affected by the decree were properties which were and continue to be within the province of Madras. The result is that the Berhampore Court cannot give relief. And no other Court in Madras can do so either for section 19 contemplates that relief can be granted only by the Court which passed the decree. It seems to be a *casus omissus* in Act IV and a matter for legislative interference.

NANDKUMARI DEVI *v.* BULKAN DEVI, (1944) I.L.R. 23 Pat. 508.

Two decisions have recently considered the meaning of the words 'separate property' occurring in section 3 (1) of the Hindu Women's Rights to Property Act, 1937. One is the decision of the Patna High Court referred to above. The other is a pronouncement of the Federal Court in *Umayal Achi* v. *Lakshmi Achi*[3]. The former is earlier in point of time. The latter contains no reference to it. In the Patna case two interesting questions among others concerning the scope and range of section 3 (1) were raised. The first was whether the property of a sole surviving coparcener could be regarded as his separate property for purposes of the Act. The second was whether on the death of the widow of an intestate who had shared his properties under the Act with a pre-deceased son's widow the latter could claim the former's share as well by way of reversionary succession in preference to the intestate's daughters under the proviso to section 3 (1).

On the first question the Federal Court has, in *Umayal Achi's case*[3], taken the view that the property of a sole surviving coparcener who died intestate cannot be regarded as his separate property within the meaning of section 3 (1) and would be governed by section 3 (2) in regard to succession thereto. In *Anant* v.

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1. (1932) 62 M.L.J. 687; I.L.R. 55 Mad. 801 (F.B.).
2. (1941) 1 M.L.J. 164 (F.B.).
3. (1945) 1 M.L.J. 108 (F.C.).

Shankar[1], while pointing out that the interest of a sole surviving coparcener was neither complete nor absolute, Sir George Rankin cited with approval the following passage in the judgment of the Nagpur High Court in *Bajirdeo Tukaram Kumbi v. Ramkrishna*[2]: "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member". In *Umayal Achi's case*[3], there was the possibility of the introduction of a coparcener or more by adoption or adoptions by the widow of the intestate as well as by the widow of his pre-deceased son. In the Patna case, however, it was not "the case of any of the parties that there was any possibility that after the death of Narayan Sao (the last coparcener) a further coparcener could be introduced into the family by adoption or otherwise". It looks as if this difference in the facts of the two cases may not, having regard to the reasoning of the Federal Court, be of any significance in considering whether the property of a sole surviving coparcener will always wear the same character as separate property or as joint family property, for purposes of the Act.

There is no single Sanskrit word or phrase in the texts connotative of separate property as opposed to joint family property. The term *sapratibandha daya* seems to express more the result rather than any distinctive character of the property. Nor have the decisions used the words 'separate property' in any uniform sense, the sense being often left to be ascertained from the context. Modern text-writers also have not been consistent in the matter. Sir Dinshaw Mulla, at one place, includes in 'separate property' the property held by a sole surviving coparcener when there is no widow in existence who has power to adopt.[4] At another place he refers to the power of the sole surviving coparcener to dispose of the coparcenary property *"as if it were"* his separate property[5]. Practically the only statute prior to Act XVIII of 1937 where the words 'separate property' occur is the Hindu Gains of Learning Act (XXX of 1930). That Act purports to remove doubts as to the rights of a member of a Hindu undivided family in property 'acquired' by him by means of his learning. Section 3 begins with the words: "Notwithstanding any custom, rule, or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer, etc". The use of the word *'exclusive'* might suggest that property may be separate though it is not the exclusive property of the acquirer. To import such a distinction into section 3 (1) of the Hindu Women's Rights to Property Act may not however be justified as the two enactments cannot be said to be in *pari materia*.

In reaching the conclusion that the property of a sole surviving coparcener will not be 'separate property' within the meaning of section 3 (1), the Federal Court was to some extent influenced by the closing words of section 3 (1) as that section stood before its amendment by Act XI of 1938, *viz.*, "devolve upon his widow along with his lineal descendants in like manner as it devolves upon his son"; words which will according to their Lordships be appropriate only to the case of self-acquired property but not to property obtained at a partition or as a sole surviving coparcener. The Federal Court recognised that the language of the clause substituted by Act XI of 1938 ran somewhat differently but it held that the change had left the scheme of the Act unaffected. It may be mentioned that in section 3 as it now stands the word "devolve" occurs only in sub-section (3), an omnibus provision covering both the case of 'separate property' and 'an interest in a Hindu joint family property'. In the Patna case the approach was different. It was recognised that in legal parlance the words

1. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232 (P.C.).
2. I.L.R. 1941 Nag. 107, 118.
3. (1945) 1 M.L.J. 108 (F.C.).
4. Principles of Hindu Law, 9th edition, 1940, p. 230.
5. *Ibid.*, 257.

'separate property' were sometimes used to refer to property bearing a particular character, a character determined by the manner in which the intestate or his pre-deceased coparceners had acquired title to the property, and at other times to refer to the mode in which the property was possessed and enjoyed by the intestate. The learned Judges argued that the use of the words "an interest" in section 3 (2) shows that the phrase "an interest in a Hindu joint family property" has reference not to the mode in which title has been acquired but principally to the nature of the possession had, that it would therefore be natural to conclude that the words 'separate property' in section 3 (1) also refer to the mode of possession and enjoyment and as such the property of a sole surviving coparcener being property exclusively enjoyed and possessed would be 'separate property' within the meaning of sction 3 (1). It may however be mentioned that section 3 (3) designates the widow's right arising both under section 3 (1) and section 3 (2) as an *"interest"* devolving on the Hindu widow; though the word "interest" occurs in section 3 (2) only and not in section 3 (1). In the circumstances, to draw support for a conclusion mainly or exclusively from the use of any particular word or phrase may not be permissible. In view of the fact that the Federal Court has given leave to appeal from its decision in *Umayal Achi's case*[1], it may be that the problem will be set at rest by the Judicial Committee.

In regard to the claim of the daughter-in-law to take the share of her mother-in-law on her death in preference to the daughters of the last full owner, it was contended that inasmuch as under the proviso to section 3 (1) the widow of a predeceased son is to inherit in like manner as a son if there is no son surviving of such predeceased son, the daughter-in law should be preferred to the daughters even as a son would be preferred to them. The learned Judges rejected the contention as according to them the words "his widow" in section 3 (1) show that the words "a Hindu" mean a male Hindu and do not include the case of a female Hindu; accordingly section 3 (1) can apply only when a male Hindu dies and has no application on the death of a female Hindu and the proviso cannot be read as an independent provision of the law so as to extend the scope of the main sub-section. It may, with respect, be pointed out that it will not be correct to treat this as a case of claim not opening on the death of a male Hindu. When a limited owner dies succession again opens out to the last full owner and such full owner in the case under notice being an intestate male it is as if the male owner died afresh in law at that point of time and there is nothing repugnant in section 3 (1) to such a claim. It would however be a different question whether section 3 (1) would admit of a claim by way of reversionary succession. Can it not be argued that finality in regard to the quantum to be taken is implied by section 3 as falling to be determined the moment the intestate actually dies and that the original sharers shall be precluded from having any further interest in the property of the intestate? The case of an illegitimate son may suggest some analogy. In *Karuppayee* v. *Ramaswami*[2] it was held that the Hindu law doctrine of "reverter" that, on the death of a female, who holds only a "woman's estate" in the property inherited by her from the last male owner, the then heir of the last male owner succeeds to his property is inapplicable to a case where his property vested on his death not in a female heir only but in a male heir also. It may be recognised at once that this view has been dissented from in *Bhagwantrao* v. *Punjaram*[3], and also that the present is not a case where the property had vested in the first instance in a female heir as well as a male heir. The question is one of intention of the legislature to be ascertained from the language of the section 3 and the learned Judges in the case under notice have held that the language does not admit of the daughter-in-law's claim by way of reversionary succession under the Act.

1. (1945) 1 M.L.J. 108 (F.C.).
2. (1932) I.L.R. 55 Mad. 856.
3. I.L.R. (1938) Nag. 255.

Horwill, J. Valia Anjuthathi Thamburatti *v.* Kalathingal Ummacha Kutty Umma.
9th August, 1945. S.A. No. 1033 of 1944.

Malabar Compensation for Tenants' Improvements Act (I of 1900), sections 6 and 3—Improvements by tenants—Set off against damages for waste committed by sub-tenants—Principles.

Malabar Tenancy Act (XIV of 1930)—Melcharth *authorising* melcharthdar *to take action against tenants and to obtain possession of the land upon redemption—If takes away* jenmi's *right to sue in ejectment and for redemption of* kudikanam.

Although the Malabar Compensation for Tenants' Improvements Act makes provision for payments for improvements, to be made direct to the sub-tenants the Act does not purport to displace the ordinary relations between landlord and tenant. If, therefore, sub-tenants commit any act of waste (as for instance by cutting trees) the tenant is liable to the landlord for the acts done by his sub-tenant in the absence of any contract between the landlord and the sub-tenants. The Act does however permit the landlord to set off against the compensation payable to a sub-tenant any sum that may be due by way of rent and damages on the land held by that sub-tenant. The right to set off carries with it a corresponding obligation to set off against the value of improvements due to a sub-tenant the damages for waste committed by that sub-tenant. Only if the value of the improvements is insufficient to compensate the landlord for damages done, would the landlord be able to have recourse against his tenant for the damages committed by his sub-tenant.

The fact that when a *melcharth* is granted, the *melcharthdar* is authorised by the deed to take action against the tenants and to obtain possession of the land on redemption, does not take away the *jenmi's* right to bring a suit in ejectment and for redemption of *kudikanam*. By granting the *melcharth* the landlord does not lose his right to protect his interests.

I.L.R. (1937) Mad. 545 : (1937) 1 M.L.J. 83 (F.B.) and 51 L.W. 569, considered.

K. P. Ramakrishna Aiyar for Appellant.

S. R. Subramania Aiyar for 1st Respondent.

K.S.

Yahya Ali, J. Rukminamma *v.* Anantha Padmanabhaswami.
21st August, 1945. A. A. O. No. 103 of 1945.

Hindu Law—Succession—Dancing girl—Female heir inheriting to—Takes an absolute and not a limited estate.

The nature of the estate that a female heir to a dancing girl will take on succession is absolute and not limited. Special features of the law applicable to dancing girls reviewed.

33 M.L.J. 207 and 71 M.L.J. 785, relied on.

N. Narasimham and *N. Ramakrishnayya* for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Wadsworth, J. Ramaswami Padayachi *v.* Vaidyanatha Aiyar.
24th August, 1945. S. A. Nos. 1707 and 1776 of 1944.

Minor—Debt due by deceased adoptive father—Natural father as de facto *guardian executing promissory note in discharge of such debts and subsequently conveying minor's property in discharge of the promissory note—If conveys valid title to the vendee—Antecedent debts binding on minor—Limitation in respect of—Cannot be extended by the promissory note of the* de facto *guardian.*

A sale by a natural father as *de facto* guardian of a minor in discharge of a promissory note executed by that guardian to discharge a still earlier debt binding on the minor (on a promissory note executed by the minor's deceased adoptive father) could not convey a valid title. The *de facto* guardian has no authority in law to execute a promissory note on behalf of the minor and the discharge of such a promissory note cannot provide the consideration for a conveyance by the *de facto* guardian to the vendee of the minor's property. Nor can the *de facto* guardian by executing a promissory note extend the period of limitation in respect of the antecedent debts contracted by the minor's deceased adoptive father. Those debts which were consequently barred by limitation at the time of the conveyance could not themselves provide any consideration for the conveyance, not being debts binding on the minor's estate.

A. S. No. 81 of 1944 (F.B.), followed.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

K. Bhashyam, T. R. Srinivasan and *R. Sundaralingam* for Respondent.

K.S.

Rajamannar, J. Meenakshi Amma *v.* Province of Madras.
24th August, 1945. S. A. No. 2217 of 1944.

Civil Procedure Code (V of 1908), section 80—Notice under—Error in description of subject-matter of suit—Effect.

In respect of a suit to set aside a revenue sale the notice under section 80 of the Code of Civil Procedure mentioned R.S. No. 722/4-b whereas the sale that actually took place and in respect of which the plaintiff claimed relief was R.S. No. 722/4-B.

Held, the particulars required by section 80 of the Code of Civil Procedure to be set out in the notice should be accurately given. The error in the description of the subject-matter is a substantial and fundamental one and a suit based on such defective notice is not maintainable.

23 L.W. 464, distinguished.

P. Govinda Menon (The Crown Prosecutor) for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) and *A. Narayana Pai* for Respondent.

K.S.

N. R. C.

Shahab-ud-din, J. China Appalaraya *v.* Venkata Subba Rao.
24th August, 1945. C. R. P. No. 1197 of 1944.

Civil Procedure Code (V of 1908), *section* 13 (b)—*Foreign decree on basis of pre-agreed compromise without any controversy—If one on merits and conclusive.*

Under French Law immoveable properties in French territory can be made liable (as security for a debt) only under a decree obtained in a French Court. A creditor in British Indian territory after agreeing to lend Rs. 525 on the security of lands which were in French territory proceeded to the French Civil Court with his borrower and obtained a consent decree for the amount which the debtor agreed to pay with interest at 8 per cent. per annum within a period of two years. The creditor had paid so far only Rs. 100 and subsequently Rs. 25. The debtor sued claiming the balance of amount agreed to be lent with interest mainly as damages for breach of contract and alternatively on the basis of specific performance of a contract to lend. In defence it was contended *inter alia* that the foreign decree was conclusive and the claim was barred.

Held, for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon. There was no controversy in the suit leading up to the foreign decree which was given mechanically in accordance with a prescribed rule merely recognising an arrangement already arrived at between the parties. And as that decision was not one on the merits the plaintiff's claim was not barred.

I.L.R. 52 Mad. 503, referred to. I.L.R. 40 Mad. 112, distinguished.
K. Bhimasankaram for Petitioner.
D. Narasaraju for Respondent.
K.S.

Yahya Ali, J. Arni Sri Vedapureswarar Temple *v.* Sundaresa Gurukkal.
27th *August,* 1945. S. A. No. 1087 of 1944.

Trust—Temple—Decree passed against represented by de facto *trustee—If binds temple.*

In a suit by the *de jure* trustee of a temple for a declaration that two decrees in favour of archakas for arrears of salary obtained against the temple represented by the *de facto* trustee, were not binding on the temple.

Held, that a decree could be validly passed against a temple represented by its *de facto* guardian, so as to be binding on the temple. A.I.R. 1940 Mad. 617, referred to.
T. L. Venkatarama Aiyar for Appellant.
P. C. Parthasarathi Aiyangar for Respondent.
K.S.

Horwill and Bell, JJ. Gangavva and another, *In re.*
28th *August,* 1945. R. T. No. 111 of 1945.
(C. A. Nos. 419 and 420 of 1945.)

Evidence Act (I of 1872), *section* 30—*Scope—Charge of murder—Statement of one of the accused that he buried the knife with which the murder was committed by other two accused in order to conceal evidence of murder—Is a confession of an offence punishable under section* 201, *Penal Code—Cannot be used against the other accused on the charge of murder under section* 302, *Penal Code.*

In a charge of murder against three persons the statement of one of the accused that he buried the knife with which the other two accused committed the murder in order to conceal the evidence of the murder, is a confession of an offence punishable under section 201, Penal Code. The statement though amounting to a confession of an offence punishable under section 201, Penal Code is not admissible in evidence against the other two accused on the charge under section 302, Penal Code.

I.L.R. 54 Mad. 75 : 59 M.L.J. 471 and (1937) M.W.N. (Crl.) 249, approved.
Obiter dictum of *Oldfield, J.*, in 14 L.W. 474, dissented from.
P. Basi Reddi and *S. Narasimha Aiyangar* for Accused.
The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.
K.S.

Yahya Ali, J. Suranna *v.* Somanna.
6th September, 1945. C.M.S.A. No. 29 of 1945.

Madras Debt Conciliation Act (XI of 1936), *section* 27 (1)—*Application for execution of decree—Limitation—Period occupied by proceedings before Debt Conciliation Board which ultimately dismissed the application for conciliation—Right of decree-holder to exclude.*

A decree was passed on 7th April, 1938. Two of the judgment-debtors filed an application before the Debt Conciliation Board on 1st November, 1939, and in that application they acknowledged the debt. The application was dismissed by the Debt Conciliation Board on 9th August, 1941. The decree-holder filed an execution petition on 27th July, 1943.

Held, the execution petition was "a proceeding before a Civil Court for the recovery of a debt," within the meaning of the expression in section 27 (1) of the Debt Conciliation Act and the period from 1st November, 1939 until 9th August, 1941, occupied by the proceedings before the Debt Conciliation Board in respect of that debt should be excluded in calculating the period of limitation for the execution petition.

T. S. Narasinga Rao for Appellant.
M. Rajagopalachari for Respondent.
K.S.

Chandrasekhara Ayyar, J. Sivapuram Sri Sivagurunathaswami Koil Trustees *v.*
4th September, 1945. Sarangapani Iyengar.
A. A. O. No. 429 of 1944.

Madras Estates Land Act (I of 1908)—Padugai land—*If* " *ryoti land* "—*Suit for recovery of possession of such land from the purchaser from the lessee of the plantain crops standing on such land—Jurisdiction of Civil Court.*

Whether or not *padugai land* (which means land on the lower level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank) is ' ryoti land ' within the meaning of the Madras Estates Land Act, such land though it may not be part of the river bed, may be part of the river bank, in which case also as in the case of river beds the land would not be comprised within the definition of " ryoti land".

Where a stranger has purchased only the plantain crops on such *padugai land* from the lessee, it is not open to him to contend that a suit against him and the lessee for the recovery of the land does not lie in a Civil Court but must be filed only in a Revenue Court. The fact that such purchaser was asked to pay the rent for the remaining years of the term of the lease cannot convert his status into that of a ryot.

K. S. Champakesa Aiyangar and *K. Venugopala Aiyangar* for Appellants.

S. V. Narayana Aiyar and *K. Venkataramani* for Respondents.

K.S.

Wadsworth, Officiating C.J. and Koman, J. Bagyalakshmi Ammal *v.* Bappu Aiyar.
11th September, 1945. L. P. A. No. 18 of 1945.

Civil Procedure Code (V of 1908), *section* 47—*Dispute between co-defendants—Appeal—Maintainability.*

An appeal is not maintainable under section 47 of the Code of Civil Procedure unless there was a conflict in the suit or the appeal therefrom between the appellant and respondent. Where a respondent bound by a decree was not a party opposed to the appellant but was supporting the appellant in her claim the case will not fall under section 47 of the Code of Civil Procedure and make the appeal maintainable.

Decision of Chandrasekhara Ayyar, J., in A. A. O. No. 283 of 1944, reversed.

T. R. Srinivasa Aiyar for Appellant.

D. Ramaswami Aiyangar and *O. K. Ramalingam* for Respondents.

K.S.

Rajamannar, J. Nallakumaran Pillai *v.* Badrakaliamman Koil at Sholavandan.
14th September, 1945. S. A. No. 1478 of 1944.

Religious Endowment—Person who has been acting as trustee for thirty-five years without challenge—If de facto *trustee or trustee* de son tort—*Suit by him for recovery of property of temple—Maintainability.*

A person who has been found to have been acting without any challenge as trustee of a temple for over 35 years though there is no order appointing him trustee cannot be said to fall within the category of *de facto* trustees or trustees *de son tort* who are not entitled to maintain suits for possession on behalf of the institutions of which they claim to be trustees. (1938) 2 M.L.J. 663 and (1944) 1 M.L.J. 35, distinguished.

K. Parasurama Aiyar for Appellant.

R. Ramasubbu Aiyar and *T. S. Vaidyanatha Aiyar* for 1st Respondent.

K.S.

Yahya Ali, J. Palanichami Nadar *v.* Governor-General of India in Council,
14th September, 1945. represented by the Manager, South Indian Railway.
C. R. P. No. 1749 of 1944.

Limitation Act (IX of 1908), *Article* 31—*Suit against railway for compensation for loss of goods consigned for transit—Starting-point of limitation.*

Under article 31 of the Limitation Act for a suit for compensation for non-delivery of goods consigned for transit time (period of one year from date when the goods ought to have been delivered) begins to run from after the definite refusal or declaration of inability to deliver by the responsible railway company.

V. Ramaswami Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

K.S.

Rajamannar, J. Mekkileri Koppirichi *v.* Uppoonni Thattari Kunhi Ramar.
17th September, 1945. S. A. No. 1900 of 1944 and A. A. A. O. No. 159 of 1944.

Malabar Tenancy Act (XIV of 1930), *section* 33 *and section* 2 (3)—*Suit for eviction of tenants from* kudiyiruppu—*Tenants' right to offer to purchase the rights—Limits.*

On 1st October, 1929, one *C* executed a marupat in favour of *P*. Under a document dated 21st October, 1935, *C* assigned his rights as lessee to *X* and *Y* who were members of the family of *C*. On 4th March, 1941, the landlord permitted the tenants to pull down the house then in existence and received a sum of Rs. 25 from the tenants as its value. Further he allowed the tenants to construct a new house at their own expense and agreed to give them the value of the new house at the time of the surrender of possession of the paramba. A new house was built in pursuance of the permission. Within 16 months thereof the lessor filed a suit to recover possession of the site occupied by the house and the approach to it, when the tenants claimed that they were entitled to purchase the site and the way leading to it under section 33 of the Malabar Tenancy Act. The plaintiff contended that the tenants were not entitled to the benefit of section 33 because of the provisions of section 2 (3) of the Act.

Held, (i) As the house in existence was built by the tenants at their own expense the building cannot be described as one " owned by the landlord " so as to exclude the applicability of the Act on the basis of section 2 (3).

(ii) " *Kudiyiruppu* " includes the sites of residential buildings and any easement attached thereto.

(iii) As the suit related to the site of a residential building the site having been in the continuous occupation of the tenants and members of their family for over ten years on the date of the institution of the suit they will be entitled to offer to purchase the rights in the *kudiyiruppu* of the landlord who seeks to evict them.

P. Govinda Menon (the Crown Prosecutor) for Appellants.

K. Kuttikrishna Menon (the Government Pleader) for Respondent.

K.S.

Yahya Ali, J. Bala Naragadu *v.* Chengappa.

18th September, 1945. C. R. P. No. 487 of 1944.

Minors—Guardian opposing compromise—Court taking the view that terms of the proposed compromise will be beneficial to the minor—Court has no jurisdiction to pass order in terms of the compromise.

The Court has no jurisdiction to enforce a compromise even though the terms of it might appear to be beneficial to the minors where the guardian objected to the Court passing a decree in terms of a compromise.

Where the application for approval of a compromise was not only not made by either the natural guardian or the guardian *ad litem* of the infant parties to a suit but it was positively opposed by them and their pleader the Court cannot pass an order in terms of the compromise. The fact that there will be some inconvenience caused if the work of carrying out the partition is directed to be done over again is not a sufficient ground for approving such compromise in the face of objections by the guardian.

I.L.R. 22 Mad. 378, relied on; 70 M.L.J. 700, distinguished.

T. K. Srinivasa Thathachari for Petitioner.

B. C. Seshachala Aiyar for Respondent.

K.S.

Kuppuswami Aiyar, J. Labbai *alias* Sheik Abdul Khadar, *In re.*

21st September, 1945. Cr.M.P. Nos. 811 and 812 of 1945.

Government of India Act (1939), *sections* 205 *and* 293—*Defence of India Rules, rule* 90-B, *prohibiting export of gold—If affects the Sea Customs Act—If involves any interpretation of section* 293 *of the Government of India Act—Certificate under section* 205—*If can be granted when point is raised for the first time in the application for issue of certificate.*

A certificate under section 205 of the Government of India Act may not be granted where the point sought to be raised before the Federal Court is raised for the first time in the application to the High Court for certificate. Assuming that it is open to raise the plea in the application for certificate, on the question whether the rule under the Defence of India Act prohibiting the export of gold affected the Sea Customs Act,

Held, the export of gold was constituted an offence only under the Defence of India Rules and the effect of sub-section (2) (*xxvi*) of section 2 of the Defence of India Act is to enable Government to make rules applying the provisions of the Sea Customs Act so far as the punishment was concerned. Section 2 (3) (*ii*) of the Defence of India Act provides for rules being made for the punishment in respect of such contraventions and therefore the punishment provided by rule 90 of the Defence of India Rules is one provided by the Defence of India Rules and not under the Sea Customs Act. Accordingly no question as regards the interpretation of section 293 of the Government of India Act is in any way involved and a certificate under section 205 of the Constitution Act must be refused.

V. Govindarajachari, P. S. Venkatesan, K. S. Rajagopalachari and *K. Srinivasan,* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Koman, J. Satyanarayana Raju *v.* Rama Raju.

21st September, 1945. C. R. P. No. 227 of 1945.

Practice—Order on preliminary issue that suit is bad for misjoinder and direction for trial of other issues as the next stage—Succeeding judge how far bound by that order.

When a suit came up for hearing the then Subordinate Judge took up the first issue " Whether the suit is bad for misjoinder of parties and causes of action " as a preliminary issue and held that the suit was bad for misjoinder and directed that " the most convenient course is to decide issues 4, 5 and 6 as the next stage; if they are decided in favour of defendants there will be no necessity to enter into any other question."

When the suit came on for hearing again the succeeding Subordinate Judge held that the course adopted by his predecessor was not a proper one and called upon the plaintiff to elect as to which of the defendants he intended to proceed against in the suit and give up the rest. On revision,

Held, the first order amounts to an adjudication on the first issue and it is not open to the successor to vary that order.

A.I.R. 1929 Mad. 121, applied.

P. Satyanarayana Rao for Petitioner.

P. Satyanarayana Raju and *Ch. Raghava Rao* for Respondent.

K.S.

Horwill and Bell, JJ. Srinivasacharyulu *v.* Venkatavaradacharyulu.
6th September, 1945. A. A. O. No. 194 of 1944.

Civil Procedure Code (V of 1908), *section* 47—*Scope—Mortgage decree—Purchaser of one of the mortgaged properties taking an assignment of the decree—Execution of decree—Plea of* pro tanto *discharge of the decree—Not open in execution proceedings—Equities to be adjusted only in separate suit for contribution.*

A person who had acquired the rights of the mortgagor in a part of the property subsequently became a transferee of the decree on the mortgage and sought to execute the decree for the full amount due. It was objected that the decree could be executed only for the proportionate share of the decree amount as against the other properties.

Held: The acquiring of the decree by the person who had already acquired the equity of redemption in part of the mortgaged property does not operate as a *pro tanto* discharge of the mortgage decree automatically. The judgment-debtors have nothing but an equity in their favour and questions as to such equities could not be raised in execution proceedings as they do not relate to the discharge or satisfaction of the decree. The parties must have their equities adjusted in a separate suit for contribution and the execution of the mortgage decree cannot be resisted.

I.L.R. 34 Cal. 13; A.I.R. 1936 Cal. 537; A.I.R. 1923 Pat. 44 and (1943) 2 M.L.J. 45, approved.

I.L.R. 10 All. 570; I.L.R. 49 All. 544 and A.I.R. 1934 Mad. 250, disapproved.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Yahya Ali, J. Adi Subbayya *v.* Subba Sastri.
17th September, 1945. C. R. P. No. 1480 of 1944.

Madras Debt Conciliation Act (XI of 1936), *section* 10 (2)—*Statement of debts not filed—Discharge of debts under—If any specific order necessary—Section* 19—*Bar of execution—Scope.*

The effect provided in section 10 (2) of the Madras Debt Conciliation Act in the event of a statement of debts not having been filed, of the debts standing discharged, is statutory and follows as a matter of law, and no specific order of the Board is required for that purpose.

Non-production of accounts is covered by section 11 which postulates that where the necessary documents or entries in books of accounts are not produced such documents shall not be admissible against the debtor in any suit brought by the creditor or any person claiming under him for the recovery of the debt. The Board has no power to pass any order purporting to be under section 10 (2) discharging the debt on the ground of non-production of accounts.

Accordingly an order by the Board that "the creditor did not produce accounts and consequently it was compelled to take action under section 10 (2) of Act XI of 1936" must be ignored as *ultra vires.*

Section 19 (*b*) of the Debt Conciliation Act bars only execution petitions in which execution has been suspended under sub-section (3) of section 18 of the Act.

V. S. Narasimhachar for Petitioner.

T. S. Narasinga Rao for Respondent.

K.S.

Chandrasekhara Ayyar, J. Punna Lal *v.* Kasturchand Ramji.
17th September, 1945. S. A. No. 1980 of 1944.

Tort—Malicious prosecution and malicious house-search—Damages—Exemplary damages—If can be awarded.

The award of exemplary damages for torts (in this case malicious prosecution and malicious house-search) in cases where the defendant has acted contumaciously is sanctioned not only by English law but also by decisions of the Madras and other High Courts. (*See* 62 M.L.J. 107 and 69 M.L.J. 98.)

It cannot be said that there is no tort known as malicious house-search. There is nothing like an exhaustive classification of torts beyond which Courts should not proceed. New invasion of rights devised by the brain of man might give rise to new classes of torts. Accordingly there could be an action for procuring maliciously a house-search. A.I.R. 1917 Pat. 43, referred to.

Where it is found that the defendant was actuated by malice in prosecuting the plaintiff and the house-search was procured with a malicious motive, the existence of strained relations between the parties for a long period is a ground for the award of exemplary damages instead of refusing it.

N R C

Where the amount of damages is reduced by the first appellate Court on a wrong view the error must be set right in second appeal though if it was a mere question of amount the High Court would not lightly interfere with it in second appeal.

K. Kotayya for Appellant.

B. V. Ramanarasu for Respondent.

K.S.

Rajamannar, J. Koyakutty *v.* Kunhali.

19th September, 1945. S. A. No. 819 of 1944.

Civil Procedure Code (*V of* 1908), *Order* 41, *rules* 27 (c) (*as amended in Madras*) *and* 29—*Appellate Court—Summoning and examining person as Court witness—Proper procedure—Necessity to specify and record on its proceedings the points on which such evidence was to be confined before the examination took place.*

The appellate Court when summoning and examining a person as a Court witness must specify the points to which the evidence is to be confined and record on its proceedings the points so specified before the examination takes place. The extraordinary power to examine a Court witness must be resorted to only in exceptional circumstances and with the adequate safeguards laid down in Order 41, rules 27 and 29 of the Code of Civil Procedure.

The giving of reasons for summoning and examining such witness in the judgment subsequently delivered cannot amount to a fulfilment of the conditions imposed on the Court by Order 41, rule 27 (c).

34 L.W. 7 (P.C.); (1942) 2 M.L.J. 287 and A.I.R. 1937 Lah. 115 referred to.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. Bashyam and *G. Gopinath* for Respondents.

K.S.

Rajamannar, J. Venkatappayya *v.* Butchayya.

20th September, 1945. S. A. No. 2093 of 1944.

Limitation Act (*IX of* 1908), *section* 20 (*as amended by Act XVI of* 1942)—*Does not operate retrospectively.*

Offer in debt conciliation proceedings to pay 7 annas in the rupee (in respect of a debt with open payments which could not save limitation) not accepted by creditor cannot be treated as an agreement to pay a barred debt under section 25 (3), Contract Act.

A promissory note was dated 20th February, 1933. Payments towards the note on 25th December, 1934, and on 19th November, 1937, could not save the suit on the promissory note in 1940 from the bar of limitation. It was contended that the offer by the debtor to pay 7 annas in the rupee in proceedings before the Debt Conciliation Board could be utilised to found a claim based on section 25, sub-section (3) of the Contract Act, though such offer was refused by the creditor who claimed the full amount in the suit.

Held, (*i*) section 25, sub-section (3) of the Contract Act is based on an agreement and as the offer was refused it cannot be said that there was any agreement.

I.L.R. 23 Mad. 94; I.L.R. 33 Cal. 1047; A.I.R. 1921 Pat. 29 and A.I.R. 1923 Cal. 659, distinguished.

(*ii*) The debt having become barred by limitation long before the amendment by Act XVI of 1942 of section 20 of the Limitation Act took effect, the amendment could not be relied upon to operate retrospectively so as to revive the barred debt. (1944) 1 M.L.J. 347, relied on. It cannot be said that the creditor can rely on the Amending Act as one superseding the law as laid down in *Rama Shah's case,* I.L.R. (1940) Lah. 470 (P.C.).

N. Subramaniam, B. S. Ramachandra Rao and *D. V. Reddi Pantulu* for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Rajamannar, J. Mulla Madina Saheb *v.* The Province of Madras represented by the Collector of West Godavari.

20th September, 1945. S. A. No. 2030 of 1944.

Workmen's Compensation Act (*VIII of* 1923), *section* 19 (2) *and section* 12 (2)—*Principal paying compensation claiming right to indemnity from contractor—Jurisdiction of Civil Court.*

There is nothing in the Workmen's Compensation Act which makes an order for compensation to the dependants of a deceased workman to which a person like a contractor, sought to be made liable to indemnify the principal paying the compensation was not a party, binding on him for all

purposes including the liability to indemnify. An order awarding compensation is entirely distinct and different from an order allowing or disallowing a claim for the indemnity. The commissioner has jurisdiction to decide the question of liability to indemnify the principal.

Section 19 (2) of the Workmen's Compensation Act precludes the Civil Court from deciding any question which is to be decided by the commissioner under the Act. Where the principal withholds an amount due to a contractor claiming it as indemnity for compensation paid by him to a deceased workman's dependants without obtaining from the commissioner a declaration of a right to such indemnity and the contractor sues in the Civil Court for recovery of the amount so withheld the principal cannot rely on his right to indemnity in the Civil Court as he had not established the right before the commissioner. Section 19 (2) of the Act is no bar to the contractor's suit but it will be a bar to the principal asserting his right to indemnity.

K. Kameswara Rao for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill and Bell, JJ. — Duraiswami Koundan, *In re.*

21st September, 1945. — R. T. No. 127 of 1945.

Criminal Procedure Code (*V of* 1898), *section* 342—*Questioning accused under—Proper procedure.*

The object of questioning the accused under section 342, Criminal Procedure Code, is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. Unfortunately, since the Privy Council decision in *Dwarkanath* v. *Emperor*, 64 M.L.J. 466, Courts have cultivated the habit of summarising the whole evidence and asking the accused what he has to say with regard to it. A summary at considerable length tends to defeat the object of section 342, Criminal Procedure Code, because the attention of the accused is not drawn thereby to the salient features of the prosecution case that seem to call for some explanation. To an ordinary straightforward account of witnesses of an actual occurrence no detailed questionings would be necessary. On the other hand, if for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime he should be given an opportunity of offering an explanation of the presence of that article in his house.

Giving a long precis of the whole prosecution evidence and asking the accused what he has to say with regard to it is an abuse of the provisions of section 342 of Criminal Procedure Code and an example of the misunderstanding of the Privy Council decision.

G. N. Chari for the accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Wadsworth, Officiating C.J. and Koman, J. — Jagadeesam Pillai *v.* Kuppammal.

21st September, 1945. — Appeal No. 296 of 1944.

Madras Estates Land Act (*I of* 1908) *as amended by Act* (*XVIII of* 1936), *section* 3 (10) *and section* 6 —*Private land—Test—Occupancy rights—When available.*

Explanation 2 to section 6 of the Madras Estates Land Act as amended in 1936 makes it clear that in respect of an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, the expressions "new" and "commencement of this Act" shall be read as meaning the 30th June, 1934, and the expression "hereafter" shall be considered as meaning the period after the 30th June, 1934.

A ryot who has acquired an occupancy right by being in possession of his holding on the 30th June, 1934, is not entitled to an occupancy right thereafter regardless of whether or not he continues to hold the land. Section 6 (1) gives the ryot a permanent right of occupancy *in his holding*. If he has no holding he can have no right of occupancy.

Where on the termination of a lease the landlord without objection from the former tenant gave a fresh lease to another and at the end of that lease admitted the son of the second lessee to possession as tenant the inference is that the previous lessees surrendered the land at the end of the period of their leases and the person subsequently admitted into possession as tenant gets the right of occupancy contemplated by section 6 of the Act.

The definition of "private land" in section 3 (10) as amended by the Act of 1936 read as a whole indicates clearly that the ordinary test for "private" land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision.

In respect of such lands, there must be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard such lands as retained for the personal

use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights. The mere fact that the landlord owns both the varams in the lands and has been letting them out on short term leases is not sufficient to warrant such lands being treated as private lands.

History of the Tanjore Palace Estates reviewed.

V. Govindarajachari, B. V. Ramanarasu and *V. Srinivasan* for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *A. Sundaram Aiyar* for Respondent.

K.S.

Wadsworth, Officiating C. J. and Koman, J. — Subramania Chettiar *v.* The Collector of Coimbatore.

21st September, 1945. — Appeal No. 328 of 1944.

Land Acquisition Act (I of 1894), section 18—Reference made under—Power of Court to go into question whether reference was made within period of limitation.

The Court has power, when a reference is made under section 18 of the Land Acquisition Act to go into the question of limitation for making such reference especially where the Collector himself has included the question of limitation as part of the reference in his letter accompanying the reference and has not decided the question himself. When a question of limitation arises in an objection to the amount of compensation it is eminently desirable that the Collector who as acquisition officer cannot be completely disinterested in such a case should refer the question of limitation to the Court. I.L.R. 47 Mad. 357 referred to; I.L.R. 52 All. 96 dissented from; I.L.R. 32 Cal. 605 (P.C.) explained; (1943) 1 M.L.J. 66 distinguished and I.L.R. 1944 Bom. 90 approved.

T. K. Subramania Pillai and *M. Annamalai* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill and Bell, JJ. — Chenchuramayya, *In re.*

9th October, 1945. — R. T. No. 132 of 1945.

Criminal Trial—Sentence—Principles to be observed in imposing when there are alternative sentences for an offence.

If a Court has two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it, in view of those circumstances, the more fitting. The fact that a murder was unpremeditated and the act was committed in sudden anger are circumstances which will justify the award of the lesser sentence of transportation for life.

K. S. Jayarama Aiyar and *R. Ramalinga Reddi* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. — Ramayya *v.* Nagapotha Rao.

9th October, 1945. — C. R. P. No. 948 of 1944.

Civil Procedure Code (V of 1908), Order 21, rules 48 and 49—Scope—Person aggrieved by order under—Remedy of—Revision—Maintainability—Rule 49—Not applicable to case of dissolved partnership.

It is difficult to hold on the language of rule 49 of Order 21, Civil Procedure Code, that there is anything in the nature of actual attachment when an order is passed under that rule. The rule provides a process in substitution of the ordinary process of attachment. An order under the rule will not amount to an attachment within the meaning of rule 58 of Order 21 for the purpose of entitling the person aggrieved to prefer a claim or an objection and if aggrieved in such proceedings to file a suit under rule 63 of that Order. In any event the remedy by way of revision can be denied only if the alternative remedy is certain, conclusive and not ambiguous. The High Court has power to interfere in revision inspite of the fact that the petitioner has another remedy.

Rule 49 of order 21, Civil Procedure Code, does not apply to the case of a dissolved partnership.

K. Subba Rao for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Bell, J. Venkanna *v.* Kotayya.
26th October, 1945. A. A. A. O. No. 25 of 1945.

Civil Procedure Code (V of 1908), *section* 48 (2) (a)—*Time limit for execution—Plea of fraud to escape the bar—If can be raised for first time in appeal.*

Section 48 of the Code of Civil Procedure sets a time limit on execution. But in order to prevent a dishonest and fraudulent debtor from preventing the execution of the decree for the period of 12 years it says that if fraud can be shown then the time limit may be extended. The decree-holder can show even at the eleventh hour and afterwards (for instance in the appeal) that the time limit laid down by section 48 should not prevail, where the conduct of the judgment-debtor is such as to have prevented the execution of the decree within the twelve years. Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them. I.L.R. 44 All. 319, relied on.

Where the judgment-debtor made a fictitious sale of all his properties to his maternal uncle within an year of the decree and by reason of such alienation the decree-holder was utterly unable to execute the decree, as the alienee for 7 or 8 years filed process after process in an endeavour to prevent the decree-holder laying his hands on the property of the judgment-debtor, the plea of fraud can be allowed to be raised for the first time in appeal. 47 M.L.J. 428, relied on. Mulla's Civil Procedure Code, page 600, distinguished.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

N. Suryanarayana and *N. C. Raghavan* for Respondent.

K.S.

Bell, J. Venkatasubbarao *v.* Bujangayya.
26th October, 1945. C. R. P. No. 602 of 1945.

Arbitration Act (X of 1940), *section* 33—*Application under, praying that an award should be set aside—Court-fee payable.*

Court-Fees Act (VII of 1870, *as amended by Madras Act V of* 1922), *Schedule II, Article* 1—*Applicability.*

An application under section 33 of the Arbitration Act, 1940, praying that an award should be set aside is not provided for in the Court-Fees Act. As such an application has to be brought under some existing provision, all that can be done is to use the general article, namely, Article 1 and it is sufficient to pay a court-fee of annas 12 as on an ordinary application.

V. Rangachari for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. Ramachandra Rao, *In re.*
26th October, 1945. Crl. R. C. No. 441 of 1945.
(Crl. R. P. No. 404 of 1945).

Madras Public Health Act (III of 1939), *section* 142 *and Criminal Procedure Code (V of* 1898), *section* 197 —*Prosecution of Health Officer of Municipality for beating and abusing in the course of his duties the maistri of scavengers—Sanction—Necessity.*

A maistri of scavengers in a municipality was abused and beaten by the Health Officer of a municipality for not preventing the scavengers creating a disturbance on the pay day. In a prosecution of the Health Officer at the instance of the maistri,

Held, the act complained of must be deemed to have been done by the Health Officer in the discharge of his duties and consequently section 142 of the Public Health Act would apply and sanction would be necessary under that section for the prosecution even though such sanction may not be necessary under section 197 of the Criminal Procedure Code on the ground that the accused was not an officer who could be removed only by the Local Government.

Kasturi Seshagiri Rao for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. Viraraghava Ayyangar, *In re.*
26th October, 1945. Crl. R. C. No. 459 of 1945.
(Crl. R. P. No. 422 of 1945).

Madras Essential Articles Restricted Acquisition Order, 1943, *section* 3 (1)—*Coming into force of order in a municipality—Bringing into Municipality of paddy purchased before the order came into force and kept in a village near by—If offence.*

The petitioner purchased some paddy at Perambur early in March 1944 and kept it there due to lack of transport facilities. He brought the paddy to Kumbakonam on 2nd April, 1944, after the Madras Essential Articles Restricted Acquisition Order, 1943, had come into force in that Municipality in the meantime *i.e.*, 14th March, 1944. In a prosecution for an offence under section 3 (1) of the order,

Held, (1) there was no "acquisition" of the paddy after the order came into force in Kumbakonam and the petitioner cannot be convicted of that offence.

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The word "acquired" in section 3 (1) of the order cannot be taken to mean "transported" into the Municipality so as to make the removing of the paddy to Kumbakonam an offence.

M. S. Venkatarama Aiyar for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. — Valmiganathan, *In re.*
30th October, 1945. — Crl. R. C. No. 620 of 1945. (Crl. R. P. No. 578 of 1945).

Penal Code (XLV of 1860), section 323 and Madras District Municipalities Act (V of 1920), section 359—Charge of obstruction to municipal servant in the discharge of his duty and also of causing hurt to him—Conviction for both offences—Propriety.

If in the course of an obstruction to a municipal servant in the discharge of his duty, hurt is caused to him, the accused can be charged separately for the two offences. Where however the Magistrate makes up his mind to proceed against the accused under section 323 of the Penal Code, it will be proper for him to drop the charge under section 359 of the District Municipalities Act. I.L.R. 59 Mad. 442, distinguished.

M. Srinivasagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. — Audinarayanamurthy, *In re.*
30th October, 1945. — Crl. R. C. No. 329 of 1945.

Drug Control Order (1943), clause 9 (a) (before amendment of 19-5-1944)—Sale of Allenbury's feeding bottle in violation of—Doubt as to whether "Feeders Allenbury" meant the bottle only or whether it included the teat and valve—Right of accused to benefit of.

The Drug Control Order as it stood on the date of a sale of an Allenbury's feeder bottle by the accused for Rs. 2-8-0 specified the prices in this manner :

"Feeders Allenbury" each Rs. 2.

Teats spare for above Allenbury's each Re. 0-6-6.

Valves spare for above Allenbury's each Re. 0-5-6.

In a prosecution for an offence under rule 81 (4) of the Defence of India Rules,

Held, as there was some doubt whether the "Feeders Allenbury" priced at Rs. 2 meant only the bottle without the teat and the valve or included them, the accused should be given the benefit of it.

B. Jagannadha Das for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. — Satyanarayana and others, *In re.*
1st November, 1945. — Crl. R. C. No. 675 of 1945. (Crl. R. P. No. 631 of 1945).

Madras Gaming Act (III of 1930), section 6—Scope and effect—Instruments of gaming and persons found in the place searched by police under a warrant—Nature of evidence—Absence of evidence that such house was used for deriving profit—Conviction—Sustainability.

Under the definition of a "common gaming house" in section 3 of the Madras Gaming Act, the element of profit or gain is an essential ingredient and when this has been negatived by the evidence there is nothing to warrant a conviction of persons found in such a house under section 9 of the Gaming Act which postulates of course the position that the persons found there were present for the purpose of gaming in a "common gaming house."

All that section 6 of the Gaming Act says is that any instruments of gaming found in any place entered and searched under the provisions of section 5 or any person found therein shall be evidence that such place is used as a "common gaming house" and that the persons found therein were there present for the purpose of gaming although no play was actually seen by the police officer or any of his assistants. It is only a piece of evidence in support of the prosecution. But it cannot be treated as a conclusive piece of evidence warranting a conviction of the persons found there without other evidence that the place was kept or used for deriving profit or gain.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J. — Kandaswami Asari, *In re.*
2nd November, 1945. — Crl. R. C. No. 700 of 1945. (Case Referred No. 36 of 1945).

Criminal Procedure Code (V of 1898), section 397—Scope—Person already under detention in a certified school—Conviction—Second detention—Commencement.

Section 397 of the Code of Criminal Procedure relates to a sentence of imprisonment, penal servitude or transportation and not to orders directing detention in a certified school. Accordingly where a person already in detention in a certified school is again convicted the detention in the second case will be concurrent with that in the first case. The detention cannot be ordered to commence at the expiration of the detention in the first case in the exercise of the powers under section 397 of the Criminal Procedure Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The accused not represented.

K.S.

Chandrasekhara Aiyar, J. Yenadi *v.* Ramalakshmanamma.
23rd October, 1945. S.A. No. 2107 of 1944.

*Inams—*Devadasi *service* inam*—Enfranchisement—Effect—If amounts to resumption and regrant—Madras Hindu Religious Endowments Act (II of* 1927), *section* 44-A.

As regards *devadasi* service *inams* there is no rule as in the case of village office service *inams* that an enfranchisement extinguishes the old title and creates a new one. An enfranchisement of a *devadasi* service *inam* under section 44-A of the Madras Hindu Religious Endowments Act does not operate as a bar to the trial of any suit or issue relating to the right as to the enjoyment of the land or the assignment of land revenue as the case may be.

K. Krishnamurthi for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Rajamannar, J. Muhammadu Mamoona Lubhai *v.* Ramanatha Pillai.
24th October, 1945. S. A. No. 1906 of 1944.

Mortgage deed—Construction—Othi—Clause "தொகையைக் கட்டி மீட்டுக்கொள்ளுவேனாகவும்"—"*Pay the amount and redeem*"*—Amounts to a personal covenant to pay the* othi *amount enabling the mortgagee to bring a suit for sale.*

A deed contained a covenant "you shall take possession of the schedule property under *othi* for a period of six years from this day, pay the assessment due to the Government, and enjoy the property. On the expiry of the stipulated period I shall pay the amount and redeem the *othi*". (*தொகையைக் கட்டி மீட்டுக்கொள்ளுவேனாகவும்*).

Held : The words clearly denote a personal covenant to pay the amount, and enables the mortgagee to bring a suit for sale.

(1918) M.W.N. 612 ; I.L.R. 56 Mad. 892 : 65 M.L.J. 194 ; (1937) M.W.N. 81 ; I.L.R. 19 Mad. 411 and I.L.R. 27 Mad. 526 : 14 M.L.J. 61 (F.B.), relied on.

(1941) 2 M.L.J. 447, distinguished.

Quaere : Whether the amendments to sections 67 and 98 of the Transfer of Property Act, are retrospective.

A. Swaminatha Aiyar for Appellants.

N. Krishnamachari for Respondent.

K.S.

Bell, J. Venkatarama Mohandas *v.* Kondia and others.
25th October, 1945. C. R. P. No. 561 of 1945.

Court-Fees Act (VII of 1870), *section* 17*—Plaintiff becoming owner of properties under a settlement deed executed by his father—Tenants in occupation of various portions of the property under tenancies created by settlor refusing or neglecting to attorn to plaintiff—Single suit against all of them for possession, mesne profits and ejectment—Suit comprises a number of* "*subjects*" *though similar in nature and court-fee on aggregate value must be paid.*

The plaintiff becoming the owner of properties under a settlement executed by his father found various persons in occupation of different portions of the properties under tenancies created by the settlor. Some of those tenants unlike others refused or neglected to attorn to the plaintiff. In a suit against such persons the plaint alleged that the defendants were trespassers and were bound to pay past and future mesne profits till date of delivery of possession. The plaintiff also prayed for delivery of possession and for ejectment. On a question as to the court-fee payable,

Held, the suit in the circumstances comprised a number of "subjects" as required by section 17 of the Court-Fees Act. Though the plaintiff may have one cause of action against all the defendants it cannot be said that there was only one subject, though the relief sought against the defendants may be similar.

I.L.R. 8 Cal. 593, referred to ; I.L.R. 33 Bom. 293, I.L.R. 29 Cal. 871 and I.L.R. 49 Mad. 836, distinguished.

Accordingly the plaint shall be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable under the Court-Fees Act.

T. S. Narasinga Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M. Appa Rao* for Respondents.

K.S.

Bell, J. Betraya Chetty *v.* Kolandai.
26th October, 1945. C. R. P. No. 272 of 1945.

Indian Soldiers Litigation Act (IV of 1925) *and Amendment Ordinance (LXIV of* 1942), *section* 6 (ii) *—Indian Soldier not party to litigation but materially concerned in outcome of the proceeding—Collector's certificate cannot have any effect—The Court itself must decide as to the interest or otherwise of the soldier before staying proceedings.*

The new sub-section (*ii*) of section 6 of the Indian Soldiers Litigation Act provides that where an Indian soldier is not a party to any proceeding, the proceeding may be suspended if it appears to the Court before which that proceeding is pending that the soldier is materially concerned in the

outcome of the proceeding. But no provision is made in such a case for a collector's certificate to have any effect. It is for the Court itself and for it alone to be satisfied as to the interest or otherwise of the soldier.

K. Kuppuswami for Petitioner.

Respondent not represented.

K.S.

Chandrasekhara Aiyar, J. — Vijayatunga, *In re.*

31st October, 1945. — Crl. Appeals Nos. 349 and 372 of 1945.

Penal Code (XLV of 1860), *section* 477-A—*Offence of falsification of accounts—Gist of—Necessity to prove that the book, paper or valuable security concerned was in the possession of the employer.*

A false statement in a letter or even in the submission of an account does not constitute an offence under section 477-A of the Penal Code. The book, paper, writing, valuable security or account alleged to have been falsified must be shown to belong to or be in the possession of the employer. In the absence of such proof the requirements of section 477-A of the Penal Code cannot be said to have been complied with.

S. Govindaswaminathan, S. Sankara Iyer and *T. K. Rajagopala Aiyangar* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Yahya Ali, J. — Ramanujam Pillai *v.* Ramaswami Pillai.

2nd November, 1945. — C.R.P. No. 452 of 1945.

Court-Fees Act (VII of 1870), *section* 7 (iv) (A)—*Suit on mortgage averring that certain earlier mortgages and sales were nominal and not binding on the plaintiff—Court-fee under section* 7 (iv) (A) *on the basis of relief for cancelllation of the earlier documents—If essential.*

Unless the plaintiff is a party to a particular document and he cannot get the relief he seeks without avoiding the document, it being an insuperable obstacle in his way, it is unnecessary for him to seek the cancellation of the document; and any relief he may otherwise ask for, on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and effect be treated as a relief for cancellation within the meaning of section 7 (*iv*) (*A*) of the Court-Fees Act.

In a suit on a mortgage bond though the plaintiff avers that certain earlier mortgages and sales were nominal and never intended to be given effect to and not binding on him, he is not bound to pay court-fee on the basis of relief for cancellation of the respective impugned documents.

The relationship between a mortgagor and mortgagee is that of a creditor and debtor and though in certain matters the mortgagee may be bound by certain equities binding on the mortgagor it cannot be said in general that he is for all purposes a successor or representative in interest of the mortgagor.

S. Venkatesa Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Ayisa Bivi Ammal *v.* Abdul Gani Rowther.

5th November, 1945. — Cr. M. P. No. 931 of 1945.

Child Marriage Restraint Act (XIX of 1929)—*Attempt to perform a child marriage—Remedy to restrain the marriage is by asking for injunction and not prosecution—There can be no offence under the Act before the marriage is actually solemnised.*

The restraint under the Child Marriage Restraint Act on solemnisation of child marriages is by punishing those who contract child marriages and those who promote, conduct, perform or direct child marriages. But before the Act could apply the solemnisation should take place. Unless the child marriage has taken place it cannot be said that any offence has been committed under the Act. Where only an attempt to perform a child marriage is alleged the proper procedure to restrain it is to apply for an injunction when the Court can act under section 12 of the Act and issue an order prohibiting the marriage.

V. Ramaswami Aiyar for Petitioners.

A. Narasimha Aiyar and *M. Srinivasagopalan* for Respondent.

K.S.

Kuppuswami Aiyar, J. — Public Prosecutor, Madras *v.* Paneswar Rao.

8th November, 1945. — Crl. R. C. No. 473 of 1945.

(Crl. R. P. No. 435 of 1945).

Criminal Procedure Code (V of 1898), *section* 562—*Conviction for offence under section* 409, *Penal Code (XLV of* 1860)—*Case cannot be dealt with under section* 562 *of the Criminal Procedure Code.*

Where a person is convicted of an offence punishable under section 409 of the Penal Code, the offence being one punishable with transportation for life the case cannot be dealt with under section 562 of the Code of Criminal Procedure.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B. S. Ramachandra Rao for Respondent.

K.S.

RADHEY SHIAM *v.* R. C. BHATTIYA, I.L.R. (1944) All. 37.

This decision is noteworthy for its animadversion of certain practices in regard to the trial of suits, which are by no means peculiar to the United Provinces. Order 9, rule 3 of the Civil Procedure Code provides that where neither party appears when the suit is called for hearing the Court may make an order that the suit be dismissed. The provisions are not mandatory but leave the matter to the discretion of the Court, see *Ram Chandra-Faraya Lal* v. *Bhaia Dharman Sahi*[1]. This is as it should be, since, in many cases the plaintiff may not be responsible for the unhappy position in which he was placed. As pointed out by Lord Penzance in *Kendall* v. *Hamilton*,[2] "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish legal rights and is thus made to govern where it ought to subserve." In the case under review, a suit triable by a Revenue Divisional Officer was posted for hearing, to a certain date at the officer's camp at a place where he had programmed to be on that date in the course of his tour. Later on, the officer decided to hear the case at another camp at a different place. Notice of the change of programme was not given to the plaintiff but was sent to the Bar Association, presumably at the officer's headquarters. The plaintiff and his pleader went to the place to which the suit had been originally posted and being apprised there of the change in the officer's programme proceeded to the new venue. But by the time they reached the place the suit had been called and dismissed. Order 5, rule 10 of the Civil Procedure Code affords a clue to the mode in which notices are to be given. There can be no dispute that a party should not suffer by what was not brought to his knowledge. In the words of Lord Cairns, L.C., in *Roger* v. *The Comptoir D'Escompts De Paris*[3], "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors." In *Mahomed Khan* v. *Mt. Sardar Begum*[4], it was held that the mere fact that the Judge put down in his order of remand that the parties were to appear before the lower Court on a certain date does not prove that the direction was "actually conveyed" to the counsel of the parties or to the parties by the counsel concerned. A similar conclusion seems to be warranted where the notification of the change in regard to the venue of hearing was merely put up at the Bar Association. The trial of a suit in camp by itself imposes handicaps on the parties by reason of the absence of a suitable library for purposes of reference, the difficulty of getting legal assistance and other factors. When on top of these there is also absence of satisfactory notice to the party affected, of the change in regard to the place of hearing, the dismissal of the suit for non-appearance of the plaintiff would be difficult to justify. In coming to that conclusion, Malik, J., observed in the present case: "There is no provision in the Civil Procedure Code for service of notice by sending such general notices to the Bar Association and there is no law under which such notices can be deemed to be sufficient. I am informed that this is the general practice in the revenue Courts. All that I can say is that if this is the practice it is very unsatisfactory. The practice of hearing cases in camps at a distance from the headquarters causes great hardship to litigants and they have to pay additional fees to the lawyers. The cases are not heard in a proper atmosphere, nor can there be any library on hand."

BHAGWAN DAS *v.* BITTAN, I.L.R. (1945) All. 148.

The point involved in the decision, commonplace though it is, is still one that often arises and in regard to which there is no uniformity of appraach. One *R*, a widow, purchased a house for Rs. 398-12-0. Within less than three months of

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1. A.I.R. 1936 Pat. 437.
2. (1879) 4 A.C. 504.
3. (1871) L.R. 3 P. C. 465, 471.
4. A.I.R. 1935 Lah. 163.

the purchase she sold it to one *B* for a sum of Rs. 499-0-0. The validity of the alienation being challenged, it was urged, firstly, that the property in question was the stridhana of the widow, and secondly, even if it was not, the transaction was supported by legal necessity. It was found that the vendor was about 50 years old, that the vendee was a trusted servant of the family, that no relation of her husband was present at the time of the alienation and that the house had been acquired from the savings effected by the widow out of the income accruing to her from her husband's property. It was held by the learned Judges that, in the circumstances, the burden lay upon the purchaser of proving that the house in question was the stridhana of the widow. It may, with respect, be pointed out that the conclusion is rather difficult to follow. If the suggestion be that the circumstances give rise to a presumption of over-reaching or undue influence on the part of the vendor, it is hard to accept. The sale was for nearly Rs. 100 more than what was paid by the widow herself within three months before the transaction. There was nothing to suggest any unfair advantage being gained against the widow. The fact that the vendor was a *trusted* servant would tend to support his *bona fides* and allay rather than raise suspicions against him. The age of the widow was only fifty and there is no question of an old woman being misled. The absence of any relative of the husband would be immaterial and without significance if the property was in fact stridhana. The observation of the learned Judges that "it is settled law that it is for the transferee from a limited owner to establish justification for the transfer" suggests in the context that what ought to be proved is really assumed, namely, that *vis a vis* the property in suit the widow was in the position of a limited owner. The real question would be whether the purchase of the property by the widow from the accumulated savings of income derived from her husband's property, would make it an increment to her husband's estate. It has been repeatedly held that it depends on the widow's intention. A large number of cases have declared that there is a presumption that her intention is to regard it as her stridhana. It is thus stated: "The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow, the presumption is none the less so when the fund with which the property is acquired is one, which though derived from her husband's property was at her absolute disposal . . . . . Her absolute power of disposition over the income derived from her limited estate being now fully recognised, it is only reasonable that in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income."[1] The ruling of the Privy Council in *Isri Dut Koer* v. *Hansbatti Koerain*[2], which is often considered as affording support to a contrary view only lays down that "if she has made no attempt to dispose of them in her lifetime there is no dispute but that they follow the estate from which they arose." This observation does not warrant the view that even where such disposal has been made it would still be for the transferee to show that the widow intended to regard her purchases from the income of the husband's estate as her stridhana. The observation in *Nabakishore Mandal* v. *Upendra Kishore Mandal*[3], that though it would be true that in regard to property acquired from the accumulated savings from the income of the property which she received from her husband, it would be possible for her to so deal with it that it would remain her own "yet it must be traced and shown to have been so dealt with" does not again suggest that till it is done there will be a presumption that the acquisition should be treated as an accretion to her husband's estate. This conclusion receives support from the observations of Lord Phillimore in *Rajah of Ramnad* v. *Sundara Pandiyaswami Tevar*[4] where it was stated: "A widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case

1. *See* Mulla's Hindu Law, 9th edition, p. 173; *Akkanna* v. *Venkayya*, (1901) I.L.R. 25 Mad. 351, etc.
2. (1884) L.R. 10 I.A. 150 : I.L.R. 10 Cal. 324 (P.C.).
3. (1922) 42 M.L.J. 253 (P.C.).
4. (1918) 36 M.L.J. 164 : L.R. 46 I.A. 64 : I.L.R. 42 Mad. 581 (P.C.).

has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property." There does not therefore seem to be any justification for holding that purchases by the widow from the income of her husband's estate will not be stridhana even where she has disposed of such purchased property in her lifetime.

COLLECTOR OF MEERUT *v.* HARDIAN SINGH, I.L.R. (1945) All. 204.

It was held in this case that a transfer of property in favour of a ward of Court is perfectly competent and though the vendee will be under no personal liability to pay the unpaid purchase money the statutory charge provided by section 55 (5) (*b*) of the Transfer of Property Act can be enforced against the property sold. The question arose under the United Provinces Court of Wards Act (Act IV of 1912). Section 37 of the Act lays down that "a ward shall not be competent to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability." The provision in the Madras Court of Wards Act (Act I of 1902) section 34 (*a*) is in almost identical terms ; only it contains after the words " pecuniary liability " the additional words " personally or in respect of such property." There is nothing in the language of these sections to indicate that the legislature intended to prohibit a ward from becoming a transferee of property. Nor is there a prohibition postulated anywhere else. Section 7 of the Transfer of Property Act provides that every person competent to contract and entitled to transferable property is competent to transfer such property. But it is nowhere said that a person not competent to contract is incapable of being a transferee of property. In the case of a minor, for instance, it has been repeatedly held that a duly executed transfer by way of sale in favour of a minor who has paid the consideration money is not void and is enforceable by him, *Ulfat Rai* v. *Gouri Shankar*[1], *Munni Koer* v. *Madan Gopal*[2], *Narain Das* v. *Mt. Dhania*[3], *Munia* v. *Perumal*[4]. Though a person is disqualified to enter into a contract such a disqualification has nothing to do with his capacity to be a transferee. Totally different considerations arise where a matter passes from the domain of contract into one of conveyance. It is true that the purchase money cannot be recovered either as a personal liability of the vendee or as against his other property. But there is no bar against the enforcement of the vendor's lien for the unpaid purchase money against the property sold. It is not the case of a disqualified person *creating* a charge ; it is a case where the charge arises *by operation of law*, and that not against property of which the Court of Wards had assumed superintendence but against property which is acquired after such assumption of jurisdiction.

EMPEROR *v.* BHAGWAT SARUP, I.L.R. (1945) All. 272.

The relative scope of sections 5 and 6 of the Child Marriage Restraint Act has been the subject of conflicting views. Section 5 provides for the punishment of " whoever performs, conducts or directs a child marriage." Section 6 states that where " a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised or negligently fails to prevent it from being solemnised, shall be punishable." In *Munshi Ram* v. *Emperor*[5], the Allahabad High Court took the view that the applicability of one or other of these two sections depended on whether the marriage was not or

1. (1911) I.L.R. 33 All. 657.
2. (1916) I.L.R. 38 All. 62.
3. (1916) I.L.R. 38 All. 154.
4. (1911) I.L.R. 37 Mad. 390.
5. (1936) I.L.R. 58 All. 402.

was contracted by the minor himself. If the marriage was not contracted by the minor himself but was arranged by others, section 5 would be attracted and it would apply not only to such persons as priests and strangers but also to the parents of both the bridegroom and the bride. In *Public Prosecutor* v. *Rattayya*[1], the Madras High Court held that sections 5 and 6 were intended to deal with different classes of persons, that section 5 would apply to persons other than the parents of the minor and that section 6 alone applies to the parents. The same view was taken in Nagpur in *Ganpat Rao* v. *Emperor.*[2] It is, with respect, submitted that the latter view seems to be more in accord with the language and intendment of the sections. The expression "where a minor contracts a child marriage" is not to be understood literally, inasmuch as the definition of "contracting party" in section 2 (*c*) of the Act as "either of the parties whose marriage is or is about to be hereby solemnised" suggests that "contracting" merely refers to the formation of the tie of marriage and not to the exercise of any personal volition by the parties between whom the marriage takes place. This is also consistent with the fact that in a Hindu marriage the bride is more or less a passive party and is the subject of a donation or dhana by her parent or guardian. It would therefore be incongruous to talk of her as *contracting* a marriage in the literal sense of the term "contract." That apart, in regard to the acts punishable, section 6 covers a wider field than section 5. Under the latter section it is only "performing, conducting or directing a marriage" that is punishable; and these will not subsume preparatory or preliminary acts such as negotiations which precede the settlement of a marriage, see *Sheikh Haidar* v. *Syed Issa.*[3] Section 6 on the other hand makes punishable the promoting—which will include even acts preliminary to the actual marriage—as well as negligently failing to prevent a child marriage. The larger responsibility can evidently be placed only on the parents or guardians natural or *de facto*. In that view, it is clear that section 5 is intended to deal with persons other than the parents or guardians and section 6 alone applies to the latter. In the case under notice the father of a girl under 14 years of age and her grandfather were charged with having committed an offence under section 6 and it was argued that the girl could not be deemed to have "contracted the marriage" in the sense in which that expression was sought to be construed in *Munshi Ram's case*[4] and therefore the parties were not liable. The contention was repelled. It was held that there being a child marriage, section 6 will apply so far as the father of the girl was concerned because he was in charge of the girl and had negligently failed to prevent the marriage. The grandfather was acquitted on the ground that while the father was alive he, the grandfather, could not be deemed to be in charge of the girl. As a proposition of law this may require to be qualified for though in a legal sense the father *qua* father may be the guardian of the girl and in charge, still as often is the case with Hindu joint families the grandfather might be the effective head of the family and manager and in *de facto* charge of all the affairs of the family.

EMPEROR *v.* KESRI CHAND, I.L.R. (1945) All. 450.

Interesting questions sounding in psychology and ethics, such as whether as between the giver and the acceptor of illegal gratification who is more culpable and how far the laying of a trap to detect such offences would be justified, arose for consideration in the case under notice. At first blush, it looks as if the first of these questions must depend on the circumstances of each case and the relative culpability of the parties will turn on who was the tempter and who was the tempted in the particular case. Chapter XI of the Indian Penal Code which deals with offences by or relating to public servants makes the receiving of bribe an offence but does not punish the giving of one as a substantive offence. A giver under

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1. I.L.R. (1937) Mad. 854.
2. A.I.R. 1932 Nag. 174.
3. I.L.R. (1939) Nag. 241.
4. (1936) I.L.R. 58 All. 402.

the Code can however be punished as an abettor—*see* section 109, illustration (*a*)—and the same punishment can be awarded too. According to the authors of the Code, the reason for not treating the giving of a bribe as a substantive offence in India is that, while in countries where the people are independent the giver is generally the tempter and the receiver is the tempted, in India, the receiver of bribes is usually the tempter. The givers " give bribes . . . . . from exactly the same feeling which leads them to give their purses to robbers or to pay ransom to pirates". The receipt of bribes in such a country therefore savours of extortion and the authors were " strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who unless temptation had been put in his way would have acted uprightly". It would thus seem that according to the authors of the Code, giving is relatively less culpable at any rate in this country in view of its facts of life. The case under review discloses conflicting views. Iqbal Ahmad, C.J., rightly points out that the measure of punishment always depends on the degree of shock to the conscience of society or the state which the offence produces and that the giver and the taker of the bribe both work in unison and it is their concerted action which produces a result constituting a menace to society. The learned Chief Justice went on to add : " There can be no question of acceptance of illegal gratification unless there is some one to offer such gratification. *The ball . . . . . is set rolling by the person who offers the bribe, and as such he is the primary culprit.*" Apropos of this point, Malik, J., observed : " At the same time we have to bear in mind that the *conduct of the officer accepting the bribe is probably more reprehensible* than even the conduct of the contractor who gives the bribe". At another place the learned Judge remarked : " To my mind the proper way of putting down this evil is to punish not only those who offer bribes *but still more severely those who take bribes*". It may, with respect, be suggested that neither of these views would be strictly accurate but that it really depends on who is the tempter and who is the tempted, which again will be a question of fact turning on such factors as the status of the people concerned, the education they have received, the degree of independence from or subservience to executive authority they enjoy, etc.

As to detection of corruption by laying traps, in *The King* v. *Mortimer*,[1] Lord Alverstone, C.J., had remarked : " The particular transaction of which evidence was given was the result of a police trap, and though I do not like police traps any more than any one else, still it is only fair to remember that it is almost impossible to detect this class of offences in any other way". In *Emperor* v. *Chaube Dinker Rao*,[2] referring to the trap which in that case was laid by a judicial officer, it was observed: "The plan of tempting and trapping the accused was objectionable and should not have been resorted to by an officer of the judicial department". In the case under notice, the learned Chief Justice thought that no exception could be taken to the setting of traps to detect corruption by persons other than judicial officers. Malik, J., expressed a slightly different view by suggesting that where detection is made through the setting of a trap that circumstance may have a bearing on the question of punishment. He said : " It has been argued before us that it is impossible to detect bribery unless traps are laid. This is largely true even though one may dislike such traps. But at the same time where the facts disclose that the bribe was solicited, even with the object of getting a man caught and punished, it would, to my mind, render the abetment less culpable than it would otherwise be". Thus it would seem that the propriety of laying traps for the detection of corruption will largely depend on who sets the traps; and, in any event, that may be a circumstance to be considered in awarding punishment.

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1. (1911) 1 K.B. 70.
2. (1933) I.L.R. 55 All. 654.

ALLAHABAD BANK LTD. *v.* MAHARAJ KISHORE KHANNA, I.L.R. (1945) All. 506.

Two of the questions that fell to be considered in the above case were (*i*) whether the power to appoint a receiver of property would carry with it the power to dismiss him and (*ii*) whether an appeal will lie in respect of such an order. There is no express provision in the Code of Civil Procedure conferring power on the Court to dismiss a receiver appointed by it. Order 40, rule 1 (*a*) merely states that where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property, whether before or after decree. Likewise Order 43, rule 1 (*s*) provides that an appeal shall lie from an order under rule 1 of Order 40. In *A. V. John* v. *Agra United Mills, Ltd.*,[1] it was held that the Court which has power to appoint is also invested with the power to dismiss. In effect the order of dismissal should be deemed to be one passed under Order 40, rule 1, which will mean that there is a right of appeal, see *Sripathi Datta* v. *Bibhuti Bhusan Datta*[2]. This view is shared by the Rangoon High Court in *Abdul Khader* v. *R. M. P. Chettyar Firm*[3]. In *Manomohan Neogy* v. *Surendra Kumar Roy Chowdhury*[4], it is, however, held that the Court may in the exercise of its discretion make any order discharging or removing a receiver and the receiver has no right of appeal against the order of removal passed by the Court appointing him. In the case under notice it was held that the Court which appoints the receiver has also the power to remove but it was felt that it was not necessary to consider whether an appeal can be carried from such order, in the view which the Court took on the other aspects of the case.

KING *v.* KING, I.L.R. (1945) All. 620.

On the question whether the rule in *Russell* v. *Russell*[5] is applicable in India there is much conflict of opinion. It was laid down in that case by the House of Lords that there being a presumption in law that the child of a married woman was begotten by her husband, neither the husband nor the wife can be permitted to give evidence tending to bastardise the child born during wedlock. Evidence of non-access can be shown only by evidence *aliunde*. The law governing the proof of the legitimacy of a child in India is found in section 112 of the Evidence Act, according to which the birth of a child during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Under section 120 of the Act the parties to a suit and the husband or wife of any party are competent witnesses in all civil proceedings. *Prima facie* there is nothing in the Evidence Act, which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that the child born during the continuance of the marriage to the wife is really a bastard. In *John Howe* v. *Charlotte Howe*[6], a Full Bench of the Madras High Court had taken the view that whatever may be the common law of England, in regard to the matter, under sections 118 and 120 of the Evidence Act, both the parties to divorce proceedings will be competent to give evidence as to non-access and the consequent illegitimacy of the child. This opinion had no doubt been rendered before the decision of the House of Lords in the *Russell case*[5], but even after that ruling the Madras High Court has stuck to that view. In *Mayandi Asari* v. *Sami Asari*,[7] it was held that in a case of disputed legitimacy there is nothing contrary to law in the mother of the child giving evidence as to

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1. A.I.R. 1931 All. 72.
2. (1926) I.L.R. 53 Cal. 319.
3. (1938) Rang. L.R. 586 : A.I.R. 1938 Rang. 387.
4. (1933) I.L.R. 60 Cal. 162.
5. (1924) A.C. 687.
6. (1913) 25 M.L.J. 594 : I.L.R. 38 Mad. 466 (F.B.).
7. (1931) 61 M.L.J. 874 : I.L.R. 55 Mad. 292.

access or non-access. And in *Purna Hanumantha Rao* v. *Ramachandrayya*,[1] the same view has been expressed. The Allahabad High Court has in *Doutre* v. *Doutre*,[2] reached a similar conclusion. In *Joseph Anthony Sweeney* v. *Mercy Beatrice Catherine Sweeney*,[3] the Calcutta High Court has taken a contrary view and held that the rule in *Russell* v. *Russell*[4] is applicable in India and will govern not only cases where the legitimacy of the child is directly in issue but also proceedings instituted in consequence of adultery. The opinion of the Lahore High Court is to the same effect. In *Chamarette* v. *Chamarette*,[5] it was laid down that in a divorce case where the paternity of the infant is in question neither spouse can give evidence of non-intercourse after marriage which would tend to bastardise the child born in wedlock. The Bombay view also seems to be similar, see *Premchand Hira* v. *Bai Galal*.[6] In the case under review, the admissibility of the evidence arose in connection with divorce proceedings and the Allahabad High Court followed its own earlier ruling. The main argument for holding that the rule in *Russell's case* applies to India rests on the language of section 7 of the Divorce Act. That section states: "Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules, which in the opinion of the said Courts are as nearly as may be, conformable to the principles and rules, on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief." The question therefore is whether this section warrants the importation into this country of the English common law rule laid down in *Russell's case*. In this country the principles of the law of evidence are set out in the Evidence Act. This Act declares the competency of the husband and wife as witnesses and section 112 lays down the rule regarding the presumption of legitimacy. The Evidence Act is a code which not only defines and amends but also consolidates the law of evidence—*see* Preamble. The proper approach will therefore be to start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England. Section 1 lays down that the Act is applicable to the whole of British India and applies to *all judicial proceedings in or before any Court*. As pointed out by the Select Committee the provisions of the Act are based on the English law of evidence modified to suit India and are exhaustive. "Under the Evidence Act, admissibility is the rule and exclusion the exception and circumstances which under other systems might operate to exclude, are under the Act to be taken into consideration only in judging of the *value* to be allowed to evidence when admitted"—see *R* v. *Mona Puna*[7]. It may also be remembered that while the Divorce Act is of the year 1869 the Evidence Act is a later enactment, Act I of 1872. Also the rule in *Russell's case* is only a rule of evidence and the provisions of section 7 of the Divorce Act can have advertence only to the substantive rules and principles peculiar to the law of divorce applicable in England and not to the rules of the other branches of law, such as the rules of evidence, regarding which there is an exhaustive statutory enactment here.

SECRETARY OF STATE *v.* KRISHNA RAO, (1945) 2 M.L.J. 352 (P.C.).

The nature of a srotriyam and its character came up for examination in this case by the Judicial Committee. Literally, a srotriyam means a grant in favour of a Brahmin learned in the vedas. In course of time it came to include assignments to servants of Government, civil or military, irrespective of the religion or caste of the grantee, as rewards for services rendered, see *Sundaramurthy Mudali* v. *Valla-*

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1. (1944) 1 M.L.J. 285.
2. I.L.R. (1939) All. 573.
3. (1935) I.L.R. 62 Cal. 1080.
4. (1924) A.C. 687.
5. A.I.R. 1937 Lah. 176.
6. (1927) I.L.R. 51 Bom. 1026.
7. (1892) I.L.R. 16 Bom. 661, 668.

nayaki Ammal.[1] In fact in the case under notice, the srotriyam grant was made for services rendered by the grantee as Head Sarishtadar of a district. What passes under the grant, whether it is the melvaram only or the soil itself, must necessarily be a question depending on the terms of the grant. In *Narayanaswami Naidu* v. *Secretary of State*,[2] where a village had been granted as a srotriyam to the holder of the office of nattuvar on the abolition of that office and the inam was subsequently enfranchised by the Inam Commission who issued a title deed with the words "besides poramboke", in regard to the quantum of the grant, the Madras High Court held that the inam would not convey, despite the language used, the right to the bed of a stream passing through the village. It is true that the inam title deed cannot convey more than what had passed under the grant—see *Secretary of State* v. *Srinivasachariar*[3]—but certainly the use of the words "besides poramboke" would be a circumstance indicating that there was no reservation by Government and if the grant was of the soil there can be no question that the grant will include the grantor's rights in tank, river and channel poramboke. In the present case no formal cowle was ever issued. It was in evidence that the grant was for three lives orginally, *i.e.*, to the grantee and his next two heirs. The inamdar accepted enfranchisement at the time of the Inam Commission's investigation and the inam was confirmed to the grantee in perpetuity the tenure being converted into a freehold, subject only to the payment of the annual quit rent then fixed. It was contended by Government that having regard to the intention of Government to grant the inam for three lives only it would not have been a grant of both varams but would be of the melvaram only. In the words of the Judicial Committee, it is now well established by decisions of the Board, firstly, that a srotriyam grant may be either of the melvaram only or it may be of the proprietary rights ; secondly, that if the original grant gave only the melvaram the subsequent proceedings of the inam commission will not change its character or vest in the inamdar a subject-matter not belonging to him. The Privy Council went on to point out that inasmuch as in the present case there was no document of grant the extracts from the inam register would be "the best evidence of the true character of the grant". Their Lordships also point out that even if the grant was to enure for a limited period only, that would not be inconsistent with the passing of the full proprietorship to the grantee for that period. But in view of the fact that the inam had been converted into a freehold and confirmed in prepetuity as shown by the proceedings of the inam commission the point had lost much of its force. Incidentally their Lordships also re-affirm the view expressed in the *Swamigal case*[4] that Madras Act VIII of 1869 created no presumption that the view entertained by the inam commission as to the character of the particular grant as conveying both varams was unfounded.

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1. (1864) 1 M.H.C.R. 465.
2. (1912) 24 M.L.J. 36.
3. (1920) 40 M.L.J. 262 : L.R. 48 I.A. 56 : I.L.R. 44 Mad. 421 (P.C.).
4. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).

IN THE GOODS OF WILLIAM BEECHY, I.L.R. (1944) All. 229.

In this case the Allahabad High Court has, if we may say so, rightly adopted the view of the Bombay High Court in preference to that of the Calcutta High Court. The question was as regards the court-fees payable on Letters of Administration. The application for the issue of the Letters was made on 27th July, 1943. The Court-fees Act was amended in the United Provinces as from 1st August, 1943, and the amount due as fees was thereby increased. The point was raised whether the court-fees on the Letters of Administration should be paid in accordance with the Act as it was before the amendment or under the amended Act. On that question the Calcutta High Court has taken the view in *Thaddeus S. Nahapiet* v. *Secretary of State*[1], that the scale of fees should be computed as on the date of the presentation of the application, that is under the unamended Act, while the contrary view found favour with the Bombay High Court in *Gangaram Tillockchand* v. *The Chief Controlling Revenue Authority*[2]. Neither the language of section 19-I of the Court-Fees Act nor the principle underlying the collection of duty on Letters of Administration would seem to justify the Calcutta view. As Crump, J., remarked in the Bombay case, the fee in such cases is payable upon the grant of probate or Letters and not on any application therefor, and clause (1) of section 19-I of the Court-Fees Act clearly provides that "No . . . . Letters of Administration shall be made . . . until . . . the Court is satisfied that the fee . . . has been paid." Consequently the fee payable should be taken to be in a state of flux till it is actually paid. To say as the Calcutta Judges did that the application originally presented became perfected by the payment or that the petitioner acquired a right to get the Letters subject to the payment of duty as on the date of the application will be to put the cart before the horse. The analogy of court-fees being collected in pauper suits as on the date of the original application (see *Kaman Mada* v. *Malli*[3]) will be misleading, for in the latter case the court-fee is payable on the plaint, and as the suit takes effect from the date of the application it is the scale of fees prevailing on that date which is material. But here the levy is on the *grant*, and the date of the application is consequently immaterial. Strangely enough the Calcutta judges placed reliance on the earlier decision of that Court in *Swarnamoyee Debi* v. *Secretary of State*[4], which on examination however does not support their view. In that case, it was merely held that in respect of such grants the full fee payable should be determined by reference to the point of time when the grant was made. The other argument on which the Calcutta Judges based their conclusion, namely, that the Court-fees Act being a taxing statute should be construed strictly and in favour of the subject is equally irrelevant, because for one thing it is not a case of ambiguous legislation, and further it may be that in a given case the amendment may reduce the fee chargeable. There can hardly be any principle in allowing the suitor to have a choice in the matter of payment of court-fees. Any discussion of the subject with reference to the retrospective effect of an Amending Act, and whether the Court-Fees Act is a law of procedure or law affecting substantive rights will be equally irrelevant, as the language of the enactment seems to be fairly clear that the duty should be determined and paid at the time of the grant of Letters of Administration. Although the decision under notice does not contain a discussion of the question in all its aspects the preference for the Bombay view would appear to be fully justified.

RAM GOPAL *v.* GOVIND DAS, I.L.R. (1944) All. 397.

This case is a useful illustration of the principle that a "gentlemen's agreement" cannot always be enforced in a Court of law. But making every allowance for the rule forbidding the enforcement of wagering contracts it is somewhat difficult to follow the reasoning as regards the return of the deposit amount. The facts were of the common variety: the up-country constituent contracted to purchase certain

1. A.I.R. 1924 Cal. 987: 39 C.L.J. 209.
2. (1927) I.L.R. 52 Bom. 61.
3. (1925) 49 M.L.J. 538.
4. (1916) I.L.R. 43 Cal. 625.

bales of cotton through a Bombay firm of commission agents and had deposited a certain amount with the latter. It was admitted that from the very inception the parties had agreed that no delivery was to be made and consequently the wagering nature of the contract was beyond dispute. On this footing the commission agents' claim to recover the losses due to them was rightly negatived. But the further question arose whether the dealer, namely the up-country constituent, was entitled to succeed in his suit for recovery of the deposit made by him. It was held by the Judge following the earlier decision of the same Court in *Chhanga Mal* v. *Sheo Prasad*[1] that it was impossible to give any relief to the plaintiff as both parties were "*in pari delicto*."

It is submitted with respect, that the conclusion arrived at on the latter point is open to criticism. No doubt as Mansfield, C.J. observed in *Holman* v. *Johnson*,[2] "if from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive rule of law, there the Court says he has no right to be assisted." But the real question is whether the plaintiff requires any assistance from the illegal transaction to establish his claim. In the case on hand the plaintiff had paid the deposit for the contract which turned out to be unenforceable. As there was no plea of appropriation of the monies by the defendants the plaintiff could well ignore the illegal transaction and the substance of the suit will be a claim for money had and received. On the other hand it was probably to the interest of the defendant to give particulars of the contract and how the monies could be retained by him. Consequently there is no reason why the plaintiff should be disentitled from recovering the deposit amount.

The decision of the Madras High Court in *Boominathan Chettiar* v. *K. S. N. Chari & Co.*[3], is a strikingly analagous case. It was held there following the rule in *Universal Stock Exchange* v. *Strachan*,[4] that while a wagering contract cannot be enforced a deposit made by one gambler with the other as security could be recovered, unless the amount had in fact been appropriated for the purpose for which it was deposited. The outermost limit for such recovery is therefore the appropriation by the other party in respect of the contract already executed. The theory of appropriation was apparently not canvassed in the case on hand and consequently there is no reason why the plaintiff seeking to recover the deposit should be held to be disentitled to relief. The rule of "*in pari delicto*" on which reliance was based is confined to cases where the party has to allege the illegal contract as part of his cause of action, and not as here when he sues for recovery of the amount *de hors* the illegal transaction. The earlier decision of the Allahabad High Court in *Chhanga Mal* v. *Sheo Prasad*,[1] which was relied on by the learned judge contains no discussion of the subject beyond a reference to section 65 of the Contract Act, and it was in its turn based on an early Bombay case. (*Dayabhai Tribhovandas* v. *Lakmichand*)[5]. But that very case is an authority for the position that the rule of "*in pari delico*" is inapplicable to such cases. No doubt if the advance is made refundable in terms of the wagering contract itself as in *Guranna Sahib* v. *Appala Naidu*[6] the claim will be unenforceable. The decisions of the Madras High Court in *Venkataraju* v. *Ramanujam*[7] and *Boominathan Chettiar* v. *K. S. N. Chari & Co.*,[3] (see also *Maung Po Hnein* v. *Maung Aung Mya*[8]) would seem to lay down the correct rule on the point. There being no fraud or corruption on the part of the plaintiff, and no appropriation of the monies on the part of the defendant towards the executed contract the plaintiff will under the general law be entitled to recover the monies from the defendant, who has no manner of right to retain them. Looked at from this point of view the case on hand will undoubtedly require reconsideration.

[END OF VOLUME.]

1. (1920) I.L.R. 42 All. 449.
2. (1775) 1 Camp. 343.
3. (1944) 1 M.L.J. 188.
4. (1896) A.C. 166.
5. (1885) I.L.R. 9 Bom. 358.
6. A.I.R. 1928 Mad. 434.
7. (1917) 34 M.L.J. 561.
8. (1926) I.L.R. 3 Ran. 543.